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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

JOSEPH D. McGOLDRICK, Comptroller of the City of New York, and ALMERINDO PORTFOLIO, Treasurer of the City of New York, *Petitioners*,
vs.
CARTER & WEEKS STEVEDORING COMPANY, *Respondent*.
No. 618 29

JOSEPH D. McGOLDRICK, Comptroller of the City of New York, and ALMERINDO PORTFOLIO, Treasurer of the City of New York, *Petitioners*,
vs.
JOHN T. CLARK & SON, *Respondent*.
No. 619 30

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

BRIEF OF PUGET SOUND STEVEDORING COMPANY ACTING ON BEHALF OF ASSOCIATION OF WASHINGTON STEVEDORES, AS *AMICUS CURIAE*

GROSSCUP, AMBLER & STEPHAN,
JOHN AMBLER,
BEN C. GROSSCUP,
ALBERT E. STEPHAN,
Attorneys for Amicus Curiae.

Address:
807 Central Building,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

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AUTHORITY TO APPEAR

This brief is filed in conformity with Rule 27, Paragraph 9, of the Revised Rules of the Supreme Court of the United States. The parties to this action through their respective counsel have consented in writing to the filing of this brief and the consent has been duly filed with the Clerk of this Court.

OCCASION FOR THIS BRIEF

On November 8, 1937, Mr. Justice Cardozo delivered the unanimous opinion of this Court in *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U.S. 90. Two of the present members of the Court participated in the decision in the case. The unanimous Court in the *Puget Sound* case held that a statute of the State of Washington which imposed a tax of one-half of one per cent upon the gross business of a taxpayer for the privilege of engaging in business activities within the state, could not constitutionally be imposed upon the gross receipts of a stevedoring company under the following state of facts:

1. Puget Sound Company was a Washington corporation.

2. It contracted with shipowners and shipmasters to load or discharge vessels through its employees which it controlled and directed.

3. All vessels involved were engaged exclusively in interstate or foreign commerce.

4. The stevedoring operation was limited to the movement of the cargo between the hold of the vessel and "first place of rest" and vice versa.

5. The movement between the hold of the vessel and "first place of rest" and vice versa was *continuous* and was always covered by one contract.

The longshoremen employed by the Puget Sound Company, operating in the hold of a vessel, unstowed the cargo and placed it upon a sling which would be raised by the ship's gear from the hold of the vessel and lowered to the dock, or pier, where other long-

shoremen employed by the Puget Sound Company would transport same as a continuous movement to the "first place of rest." When loading a vessel the reverse would occur and longshoremen employed by the Puget Sound Company would transport the cargo from a "place of rest" on the dock as a continuous movement to ship's tackle, which would lift the cargo into the hold of the vessel where it would be stowed by longshoremen employed by the Puget Sound Company. It is clear that the Puget Sound Company in the above operation was engaged in interstate or foreign commerce. Mr. Justice Cardozo, in his opinion at pages 92-93, said:

> "Transportation of a cargo by water is impossible or futile unless the thing to be transported is put aboard the ship and taken off at destination. A stevedore who in person or by servants does work so indispensable is as much an agency of commerce as shipowner or master. 'Formerly the work was done by the ship's crew; but, owing to the exigencies of increasing commerce and the demand for rapidity and special skill, it has become a specialized service devolving upon a class "as clearly identified with maritime affairs as are the mariners".' *Atlantic Transport Co. v. Imbrovek*, 234 U.S. 52, 62. No one would deny that the crew would be engaged in interstate or foreign commerce if busied in loading or unloading an interstate or foreign vessel. Cf. *Baltimore & O.S.W.R. Co. v. Burtch*, 263 U.S. 540. The longshoreman busied in the same task bears the same relation as the crew to the commerce that he serves. Indeed, for the purposes of the Merchant Marine Act (41 Stat. 988, 1007), a stevedore is a 'seaman.' *International Stevedor-*

ing Co. v. Haverty, 272 U.S. 50. A stipulation in the record tells us that any serious interruption in the service of such cargo handlers cripples at once the activities of a port and slows down and obstructs the free and steady flow of commerce. We might take judicial notice of the fact if the stipulation were not here."

See *Walling v. Goldblatt Bros.*, 128 F.(2d) 778, 782 (1942), where the court said:

> "Whether workmen unloading out-of-state goods at the warehouses are 'in commerce,' depends upon when these come to rest and lose their interstate character. They have not reached their destination until actually unloaded and deposited on the warehouse platform. Then and not until then, their interstate journey is at an end." (Citing many authorities)

OTHER SERVICES OF PUGET SOUND COMPANY

In addition to the services of the Puget Sound Company outlined above it performed a second service whereby it did not directly participate in the work of loading and discharging a vessel, but on the other hand merely collected longshoremen and supplied them for employment by the vessel and her owner, advancing their pay at the end of the job and billing the vessel and her owner for the amount of the payroll plus a commission for this service. The Court found that this activity of the Puget Sound Company while an aid to the interstate and foreign commerce was not itself "interstate or foreign commerce" but was a local business in the nature of a labor or employment agency and earnings derived from such activities were properly taxed by the state.

INSTANT CASES

From an examination of the transcripts of record the facts in the instant cases appear quite similar to those involved in the *Puget Sound* case. The record in Case No. 519 indicates some services of the stevedoring company there involved which are a little remote from actual cargo handling (Tr. 59). The Supreme Court of New York, Appellate Division, First Department, in Case No. 518, unanimously annulled the imposition of a tax of the City of New York upon the gross receipts of a stevedoring company upon the authority of the *Puget Sound* case (Tr. 77). This action was affirmed by the Court of Appeals of the State of New York (Tr. 79) without opinion (Tr. 83). The same action was taken by the New York Court in Case No. 519 (Tr. 124; 125, 130). This brief is limited solely to upholding the decision of the Court in the *Puget Sound* case. It will not discuss the facts of the two New York cases.

NO PRESENT DECISION OF THIS COURT REQUIRES A MODIFICATION OR REVERSAL OF THE *PUGET SOUND* CASE.

The case of *Puget Sound Stevedoring Co. v. Tax Commission* has been referred to or distinguished by the United States Supreme Court ten times since its decision and has never been disapproved or questioned. The ten cases are as follows:

James v. Dravo Contracting Co., 302 U.S. 134, 185 (1937);

Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 258 (1938);

Coverdale v. Arkansas-Louisiana Pipe Line Co., 303 U.S. 604, 609 (1938);

J. D. Adams Manufacturing Co. v. Storen, 304 U.S. 307, 312 (1938);

Gwin, White & Prince v. Henneford, 305 U.S. 434, 442 (1939);

Southern Pacific Co. v. Gallagher, 306 U.S. 167, 178, 179 (1939);

McGoldrick v. Berwind-White Coal Co., 309 U.S. 33, 62 (1940);

Nelson v. Sears, Roebuck & Co., 312 U.S. 359, 369 (1941);

Murdock v. Pennsylvania, 319 U.S. 105, 133 (1943);

Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292 (1944).

GENERAL DISCUSSION

This direct attack on a unanimous opinion of this Court, rendered slightly over eight years ago, is primarily based upon the following article which appeared in the Harvard Law Review:

"Gross Receipts Taxes on Interstate Transportation and Communication," 57 Harv. L. Rev. 40 (1943).

The author of this article, William B. Lockhart, then Associate Professor of Law, Stanford University, forecast the reversal by this Court of the *Puget Sound* case. The author of the article bases his conviction upon what he terms the "new attitude" and "new approach" of the Court inaugurated by the case of *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938) (pp. 41, 91).

The author of this very able article frankly takes credit through an earlier article in the same publication for the action of this Court in *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940). He says on page 87:

> "* * *. For a period of over fifty years the Supreme Court has ruled that a tax on an interstate sale is invalid because such a sale 'is interstate commerce' which 'cannot be taxed at all.' In 1939, it was pointed out that the cases so holding all involved drummer's license taxes which were more soundly condemned on practical grounds, and that other practical considerations should influence the Court to sustain a sales tax measured by the sales price on interstate sales when imposed by the buyer's state provided the Court would be willing to ignore or overrule the formal dogma it had been announcing for fifty years.[192] And in 1940 it did just this in the *Berwind-White* case. * * *"

Note 192 is as follows: "See Lockhart, *The Sales Tax in Interstate Commerce* (1939) 52 Harv. L. Rev. 617, 620-28, 644."

The 1943 article (which alone will be considered hereafter in this brief) is cited by Mr. Justice Douglas in his opinion in *International Harvester v. Department of Treasury*, 322 U.S. 340, 346 (1944), as authority for the following statement:

> "* * * Indeed, if we are to remain concerned with the practical operation of these state taxes rather than with their descriptive labels * * *, we must acknowledge that the sales tax sustained in the *Berwind-White* case 'was, in form, imposed upon the gross receipts from an interstate sale.' * * *"

This Article was likewise cited in *Spector Motor Service v. Walsh*, 139 F.(2d) 809 (1944), at page 814, and clearly influenced the majority of the Court of Appeals of the Second Circuit to "examine certain specific trends" (p. 814) supposedly disclosed by this Court; in particular what the Court of Appeals termed the trend of this Court "away from the automatic condemnation of taxes by formal, preconceived, and antiquated rules" (p. 814).

When the *Spector* case reached the Supreme Court in *Spector Motor Service v. McLaughlin*, ... Supreme Court ....., 65 Sup. Ct. 152 (1945) the Supreme Court sent the case back to permit the Connecticut courts to determine what the statute actually purported to cover. The *Spector* case is of interest here here for this language in the Supreme Court decision (at p. 153):

> "If Connecticut in fact sought to tax the right to engage in interstate commerce, a long course of *constitutional history* and an *'unbroken line of decisions'* would indeed be brought into question." (Emphasis ours)

The *Spector* case involved a franchise tax upon the *net income* of a foreign corporation engaged wholly in interstate transportation. The tax on *gross income* involved in the *Puget Sound* case is in many ways more objectionable than the tax laid on *net income* involved in the *Spector* case.

U. S. Glue Co. v. Oak Creek, 247 U.S. 321 (1918);

Underwood Typewriter v. Chamberlain, 254 U.S. 113 (1920);

Atlantic Coast Line v. Daughton, 262 U.S. 413 (1923);

Matson Navigation Company v. State Board, 297 U.S. 441 (1936);

New York ex rel. Cohn v. Graves, 300 U.S. 308 (1937).[1]

The line of cases invalidating the imposition of such a direct tax on gross receipts from interstate and foreign transportation and communication is equally "long" and "unbroken."

A "LONG" AND "UNBROKEN" LINE OF DECISIONS INVALIDATE GROSS RECEIPTS TAXES DIRECTLY LAID ON INTERSTATE AND FOREIGN TRANSPORTATION AND COMMUNICATION

Professor Lockhart commences his Article by emphasizing what he considers to have been in 1938 a change in the "venerable decisions which had long been the repositories of the ancient formula condemning state taxes on gross receipts from interstate commerce" (p. 40). He speaks of these decisions on page 43 as "a hoary dogma." On page 62 of the article he states:

> "In 1936 the rule against taxing gross receipts from interstate transportation and communication was still firmly entrenched."

He frankly recognizes that the *Puget Sound* case followed an uninterrupted line of decisions of this court extending over a period of many years. We emphasize this as the Court is not being asked in the instant case

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[1] See also Professor Lockhart's Article, page 65, note 95.

to overrule a single case which possibly did not fit into the pattern of its other decisions. It is asked to overturn a long fixed rule of constitutional law. The views of Mr. Justice Douglas, expressed in his dissents in *Adams Mfg. Co. v. Storen*, 304 U.S. 307, 324 (1938) and *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434, 453 (1939), to the effect that the imposition of the tax forbidden in the *Puget Sound* case was of relatively modern origin are not shared by Professor Lockhart. Nor are they shared by a majority of this Court. In *Gwin, White & Prince v. Henneford*, 305 U.S. 434 (1939), Mr. Justice Stone said:

> "For half a century, following the decision in *Philadelphia & So. SS Co. v. Pennsylvania*, 122 U.S. 326, *it has not been doubted* that state taxation of local participation in interstate commerce, measured by the entire volume of the commerce, is likewise foreclosed." (Emphasis ours)

This statement was made a year after the case of *Western Live Stock v. Bureau of Revenue* on which Professor Lockhart so heavily relies. Chief Justice Stone rendered both opinions.

On page 40 of his article, Professor Lockhart says:

> "From 1887 to 1937 the Supreme Court expressly invalidated nine non-discriminatory state taxes imposed on or measured by gross receipts from interstate commerce. All of these involved receipts from transportation or communication."

These nine cases are:

Philadelphia & So. S. S. Co. v. Pennsylvania, 122 U.S. 326 (1887);

Fargo v. Michigan, 121 U.S. 230 (1887);

Ratterman v. Western Union Tel. Co., 127 U.S. 411 (1888);

Western Union Tel. Co. v. Alabama, 132 U.S. 472 (1889);

Galveston H. & S. A. Ry. v. Texas, 210 U.S. 217 (1908);

Meyer v. Wells Fargo & Co., 223 U.S. 298 (1912);

N. J. Bell Telephone Co. v. State Board of Taxes, 280 U.S. 338 (1930);

Fisher's Blend Station, Inc., v. State Tax Commission, 297 U.S. 650 (1936);

Puget Sound Stevedoring Co. v. State Tax Commission, 302 U.S. 90 (1937).

He summarizes these decisions on page 65 of his Article.

This Article does not mention the case of *Texas Transport v. New Orleans*, 264 U.S. 150 (1924), decided thirteen years before the *Puget Sound* case. The *Texas Transport* case involved a city ordinance of the City of New Orleans described as follows by the lower court which upheld the tax:

City of New Orleans v. Texas Transport & Terminal Co., 152 La. 497, 93 So. 751 (1922):

"The ordinance in question, No. 6608 of the commission council of New Orleans, is the *general revenue law* of the city. It levies a graded license tax upon every business, trade or occupation that is subject to taxation. The tax levied upon the business of steamship agents is graded according to the *annual gross receipts* of the business, and is $400 per annum when the year's receipts amount to $100,000 or more. The receipts of defendant's business exceeded $100,000 and defendant is therefore liable for the tax of

$400, unless the business is interstate or foreign commerce.

"The record does not show whether defendant is a domestic or foreign corporation, but that is a matter of no importance.[2] The main office, or what is called the home office, of the company, is in New York. The establishment in New Orleans, carrying on the business that is the subject of this litigation, is referred to in the testimony as a branch office. * * *" (Emphasis ours)

The Texas Transport Company was an independent steamship agency acting as such for various foreign steamship companies. Its operations were sufficiently extensive so that its tax was no longer measured by gross receipts and the maximum fee of $400.00 a year applied. The majority of this Court reversed the state court and held the tax unconstitutional under the Commerce Clause although it was a wholly non-discriminatory tax and although the taxpayer, a local independent concern, was merely included in a general taxing ordinance, and although the particular receipts did not appear to have been taxable by any other state. Mr. Justice Holmes and Mr. Justice Brandeis dissented on two grounds: First, the tax in the case of the *particular* taxpayer, on account of its extensive operations, was a flat tax of $400 per annum and so unlike a gross receipts tax in that it did not lay "a burden upon every transaction" (p. 157); second, the services of the taxpayer were not limited to

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[2]See authorities cited in dissenting opinion of Mr. Justice Stone in *Northwest Airlines v. Minnesota*, 322 U.S. 292, 316 (1944).

interstate commerce such as "soliciting" cargo or passengers (p. 157).

As to the first ground of dissent, the two Justices in the *Texas Transport* case frankly recognized the propriety of the decision in the *Puget Sound* case where there was no "ceiling" on the tax by the following language:

> "On the other hand, the burden is deemed direct, where the tax is upon property moving in interstate commerce * * * or where it lays, like a gross receipts tax, a burden upon every transaction in such commerce, 'by withholding, for the use of the state, a part of every dollar received in such transactions' * * *." (p. 156)

In connection with the second ground for dissent, the dissenting opinion outlined the various activities in which the Texas Transport was engaged which included "arranging with independent stevedoring concerns for discharging and loading cargoes." It will be observed that such a local function of Puget Sound Company was found taxable in the *Puget Sound* case and that Mr. Justice Brandeis concurred in the *Puget Sound* decision which thus answered *both* of the above objections he had raised in his dissenting opinion in the *Texas Transport* case.

The *Texas Transport* case is direct authority for the *Puget Sound* case and follows the "long" and "unbroken" line of decisions invalidating the imposition of such taxes on interstate and foreign transportation and communication.

ARGUMENT ADVANCED FOR REVERSAL OF THE *PUGET SOUND* CASE

The argument advanced by Professor Lockhart for the reversal of the unanimous opinion of this Court in the *Puget Sound* case may be summarized as follows:

(1) As the tax is laid upon activities necessarily confined to a single state there is no chance of a cumulative tax burden from another state so it is not forbidden by the Commerce Clause.

(2) This Court is increasingly inclined to disregard "formal" distinctions between types of taxes. It should thus reverse its opinion in the *Puget Sound* case as the gross receipts there taxed can be taxed by another type of tax. The constitutionality of a tax should rest upon substance rather than form.

We shall discuss in order these two points.

(1) As the tax is laid upon activities necessarily confined to a single state there is no chance of a cumulative tax burden from another state, so it is not forbidden by the commerce clause.

It is quite true that the tax in the *Puget Sound* case was laid upon the gross receipts of a Washington corporation engaged wholly in the loading and discharging of cargoes moving continuously in interstate or foreign commerce *within the State of Washington.* This particular activity of the Puget Sound Company

obviously cannot be reached by another *state*.[3] But assuming that a danger of a cumulative tax is necessary the gross receipts in question can be the subject of cumulative taxation by other taxing bodies in the *same state*.

Professor Lockhart, at page 83 of his Article, emphasizes the danger of a second tax in the *same state* based upon the same subject matter. He says:

> "* * * A second tax by which the *same state* seeks to tax the intangible values arising out of the receipts should be avoided. It will be recalled that *United States Express Co. v. Minnesota* distinguished both the *Galveston* and *Wells Fargo* cases on the ground that in those cases the taxes attempted to reach the gross receipts from interstate commerce when there was already another tax on the property covering its full value as a going concern. The Court did not pursue the point further, since it only needed to demonstrate that the taxes in those two cases could not possibly be classified as in lieu of property taxes. Neverthe-

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[3]It has not been considered necessary in the past that the danger of a cumulative tax be present:

Galveston H. & S. A. Ry. v. Texas, 210 U.S. 217 (1908);

Texas Transport Co. v. New Orleans, 264 U.S. 150 (1924);

N. J. Bell Telephone Co. v. State Board, 280 U.S. 338 (1930);

Fisher's Blend Station v. Tax Commission, 297 U.S. 650 (1936);

Puget Sound Stevedoring Co. v. Tax Commission, 302 U.S. 90 (1937).

> lese this distinction could be invoked if the present Court were inclined to view with disfavor two attempts by the same state to tax the economic value resulting from earnings derived from interstate transportation. While such a tax system would not threaten interstate transporation with a burden not borne by local transportation, it might be thought to threaten transportation in general with more than its fair share of the local tax burden in such a manner as to result in serious repercussions on interstate traffic." (p. 83) (See also p. 51, note 49)

The danger pointed out by Professor Lockhart actually exists in the State of Washington and such danger applies to Puget Sound at the present time. In Appendix I to this brief we quote the present provisions of the state law imposing the state "Business and Occupation Tax" upon the taxpayer which was declared unconstitutional in so far as certain operations of Puget Sound were concerned. In Appendix II we quote the pertinent portions of a City Ordinance of the City of Seattle which creates a similar Business and Occupation Tax upon persons engaged in business in that city, the principal seaport of the State of Washington and principal place of business of the Puget Sound Company. Both taxes are laid directly on gross receipts from the same transaction.

It might be also mentioned at this point that there would seemed to be no reason why the State of New York should not enact such legislation following the lead of the City of New York, thus reversing the order of imposing the tax by the two taxing bodies in the State of Washington. In such case interstate move-

ments by water between the State of New York and the State of Washington would have four gross receipts taxes on the loading and unloading of the vessel involved in water transportation between the two states. There may be other taxing bodes in both states to whom taxation privileges have been granted who might likewise add their burden to the movement between the two states.

Gross receipts taxes are a direct burden upon every ton of cargo moved. As they are cumulatively applied their ultimate potential burden is substantial as this court has repeatedly recognized. Oregon and California have no such tax.

(2) This Court is increasingly inclined to disregard "formal" distinctions between types of taxes.

Professor Lockhart, in his Article, repeatedly refers to what he considers the increasing tendency of this Court to disregard "formal" distinctions in taxes (pp. 52, 58, 85, 91). The trend, if any, suggested by Professor Lockhart seems to have somewhat slowed down the year following the publication of his Article.

In *McLeod v. Dilworth Co.*, 322 U.S. 327 (1944), a Tennesse corporation which was not qualified to do business in Arkansas and which had no sales office nor any other place of business in Arkansas, made sales of goods in Tennessee for delivery by common carrier in Arkansas. Orders for goods were solicited in Arkansas by traveling salesmen domiciled in Tennessee, or by mail or telephone. When an order was placed it required acceptance by the Tennessee office and, on approval, the goods were shipped from Tennessee to

the buyer in Arkansas, title passing upon delivery to the carrier in Tennessee. Collection of the sales price was not made in Arkansas. The tax on such transactions imposed by the State of Arkansas was construed by the Arkansas Supreme Court as "a *retail sales tax* and *not* a *use tax*" (Emphasis ours). It was known as the "Gross Receipts Tax" (p. 328). Mr. Justice Frankfurter delivering the majority opinion recognized that the imposition of taxes must have a boundary and that "A boundary line is none the worse for being narrow" (p. 329). In declaring the tax unconsitutional he added:

> "* * * A sales tax and a use tax in many instances may bring about the same result. But they are different in conception, are assessments upon different transactions, and in the interlacings of the two legislative authorities within our federation may have to justify themselves on different constitutional grounds. A sales tax is a tax on the freedom of purchase—a freedom which wartime restrictions serve to emphasize. A use tax is a tax on the enjoyment of that which was purchased. * * *
>
> "* * * Though sales and use taxes may secure the same revenues and serve complementary purposes, they are, as we have indicated, taxes on different transactions and for different opportunities afforded by a State." (pp. 330-1)

Mr. Chief Justice Stone, Mr. Justice Roberts, Mr. Justice Reed and Mr. Justice Jackson joined with the author of this opinion. Mr. Justice Douglas, Mr. Justice Black, Mr. Justice Murphy and Mr. Justice Rutledge dissented. The basis of the dissenting of the first three may be found in the following language from

the dissenting opinion of Mr. Justice Douglas, at page 333:

> "* * * But a use tax and a sales tax applied at the very end of an interstate transaction have precisely the same economic incidence. Their effect on interstate commerce is identical. * * *"

The special dissent of Mr. Justice Rutledge, at page 352, quoted hereafter, further emphasizes what Professor Lockhart would consider the "formal dogma" of the majority of the Court in *McLeod v. Dilworth Co.*, 322 U.S. 327 (1944).

On May 15, 1944, the same date of the decision in the case of *McLeod v. Dilworth Co.*, 322 U.S. 327, Mr. Justice Frankfurter also rendered the opinion of six members of the court in *General Trading Co. v. State Tax Commission of the State of Iowa*, 322 U.S. 335 (1944), where a "use" tax was upheld by the majority of this court. There appears to be no difference in the facts of this case and those in the case of *McLeod v. Dilworth Co.* ,except that the Iowa tax was a "use" tax and the Arkansas tax was a "sales" tax. In his opinion in *General Trading Co. v. Tax Commission*, Mr. Justice Frankfurter, in upholding the "use" tax, was careful to say, "of course, no state can tax the privilege of doing interstate business" (p. 338). Mr. Justice Rutledge wrote a special concurring opinion. Mr. Justice Jackson and Mr. Justice Roberts dissented on the ground that the tax was upon interstate commerce.

On the same date a third case was decided by this Court, *International Harvester Co. v. Dept. of Treasury*, 322 U.S. 340 (1944). The last case involved an

Indiana tax upon gross income applied to receipts from certain classes of sales which seven members of the court concluded were local sales, and so subject to tax. Mr. Justice Douglas wrote the majority opinion upholding the imposition of the tax in which five Justices concurred. The impact of Professor Lockhart's Article upon Mr. Justice Douglas is illustrated by his citation of same as authority for the following language which we quote again from his majority opinion:

> "Indeed, if we are to remain concerned with the practical operation of these state taxes rather than with their descriptive labels (*Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 363), we must acknowledge that the sales tax sustained in the *Berwind-White* case 'was, in form, imposed upon the gross receipts from an interstate sale.' * * *"

Mr. Justice Roberts took no part in the decision and Mr. Justice Jackson dissented.

Mr. Justice Rutledge, by a special opinion concurred in *General Trading Co. v. Tax Commission*, and *International Harvester Co. v. Dept. of Treasury*, but dissented vigorously from *McLeod v. Dilworth Co.*, emphasizing that the mere fact that Iowa classed her tax as a "use" tax and Arkansas described her tax as a "sales" tax was no ground for a different constitutional result.

> "The only other difference is in the terms used by Iowa and Arkansas, respectively, to describe their taxes. For reasons of her own Arkansas describes her tax as a 'sales tax.' Iowa calls hers a 'use tax.' This court now is committed to the

validity of 'use' taxes. * * * Other things being the same, constitutionality should not turn on whether one name or the other is applied by the state. * * *" (p. 352)

The dissenting opinions of Mr. Justice Douglas and Mr. Justice Rutledge in the above cases might be commented on briefly at this point.

The case of *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940), heavily relied upon by Mr. Justice Douglas in his dissent to *McLeod v. Dilworth*, at page 332, should not affect the instant case. As Professor Lockhart, on page 87 of his Article, frankly admits the Supreme Court had never before directly ruled against the constitutionality of the particular application of the sales tax there involved. In other words, there was no fixed rule by this Court on the subject of the application of such a tax to the transactions there involved. The general trend, only, in court decisions was thought to be against the validity of the tax. *Stare decisis* was not *directly* involved The Court was more or less free to make a new rule to fit a new application of a relatively new type of tax. There were many persuasive reasons for upholding the tax in that case including the prejudice the Court felt which might result to local business from a denial of the same. Such considerations are wholly absent here (See Professor Lockhart's Article, p. 69, note 138). The taxation of interstate and foreign transportation and communication may very well fall within another category. The incidents of the two phases of commerce are very different. The majority opinion of Mr. Chief Justice Stone in the *Berwind-*

White case clearly recognized the distinction between the tax there involved and the one involved in the *Puget Sound* case by the following language supporting the condemnation of the application of certain types of tax including the one here involved to certain activities:

> "Certain types of tax may, if permitted at all, so readily be made the instrument of impeding or destroying interstate commerce as plainly to call for their condemnation as forbidden regulations. Such are the taxes already noted which are aimed at or discriminate against the commerce or impose a levy for the *privilege of doing it*, or *tax interstate transportation or communication or their gross earnings*, or levy an exaction on merchandise in the court of its interstate journey. * * *" (Emphasis ours) (p. 48).

The views of Mr. Justice Douglas in the earlier case of *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 363 (1941), should likewise be considered, where he said:

> "In passing on the constitutionality of a tax law 'we are concerned only with its practical operation, not its *definition* or the precise form of *descriptive* words which may be applied to it.' * * *" (Emphasis ours).

While the constitutionality of a tax is of course determined by this Court, it will defer to the determination of the state courts as to the meaning and application of the law.

Storaasli v. Minnesota, 283 U.S. 57, 62 (1931);

Illinois Central R. R. Co. v. Minnesota, 309 U.S. 157, 165 (1940).

The meaning and application of the business and occupation tax of the State of Washington involved in the *Puget Sound* case is well settled by both state and federal decisions. It is an excise or occupation tax imposed upon the privilege of doing business within the state. The tax is imposed for revenue, not for regulation. It is measured by and imposed upon gross receipts derived from the doing of business.

State ex rel. Stiner v. Yelle, 174 Wash. 402, 25 P.(2d) 91;

Supply Laundry v. Jenner, 178 Wash. 72, 34 P.(2d) 363;

Pacific Tel. & Tel. Co. v. Tax Commission, 183 Wash. 697, 48 P.(2d) 938, affirmed 297 U.S. 403;

Fisher's Blend Station v. Tax Commission, 182 Wash. 163, 45 P.(2d) 942, reversed 297 U.S. 650;

Paramount v. Henneford, 184 Wash. 376, 51 P.(2d) 385, cert. den., 298 U.S. 665;

Puget Sound Stevedoring Co. v. Tax Commission, 189 Wash. 131, 63 P.(2d) 532, 302 U.S. 90.

It must be admitted that the views of Mr. Justice Douglas and Mr. Justice Rutledge in these three cases follow, to some extent at least, the prophesies of Professor Lockhart in his Article. The decisions of the majority do not.

FORMALISM, PRACTICALITY AND PRAGMATISM

Professor Lockhart, in his Article, repeatedly decries what he terms "formalism" or "formal distinctions" in determining the constitutional effect of taxes

(pp. 42, 50, 51, 52, 58, 59, 63, 69, 90, 91, 92, 93, 94). He repeatedly refers to what he believes to be the trend towards a "practical" approach by this Court to the subject (pp. 42, 51, 67, 85). He discusses and forecasts an increasing so-called "pragmatic" approach of this Court to the subject of the constitutionality of the taxes here discussed (pp. 42, 50, 63, 79, 85). The word "pragmatic" is thus defined in Webster's New International Dictionary:

> "* * * busy, active, skilled in business, especially in law and state affairs; * * * practical; matter-of-fact. Dealing with practical values or consequences."

The majority of the court in the case of *McLeod v. Dilworth Co.*, 322 U.S. 327 (1944) supported what Professor Lockhart would consider a "formal" distinction. The minority of the court vigorously pointed out this lapse from what they believed to be the course of the court reflected in the *Berwind-White* case. While "formal" distinctions may sometimes be unfortunate, this is by no means true in the case of taxes. Taxes are necessarily formal. They must be created in specific terms by legislative bodies. Some activities are taxed, some are not. But so long as the classification is real the courts will not disturb what may in many cases prove to be a rather unwarranted distinction. As in the case of legislative bodies which are often forced to make somewhat arbitrary rules of taxation, so in the case of this Court, the line of constitutionality of taxes, as Mr. Justice Frankfurter says, is "none the worse for being narrow." The distinction made by legislative bodies between taxpayers

sometimes appears to be arbitrary. The distinctions made by this Court, to whom the duty of protecting interstate and foreign commerce from undue burdens has been granted, to some may appear equally arbitrary. If all state taxes upon interstate and foreign commerce were held by this Court to be constitutional, that commerce which under the protection of this Court has made the Nation great, would be seriously crippled.

The most "practical" and "pragmatic" approach to the subject of taxes, in the interest of state taxing bodies and those "skilled in business" or "in law," is for the Court to establish clear rules of what can and what cannot be constitutionally taxed. Within the rules so laid down legislative bodies may pass and administer the laws thus permitted. Business men and lawyers may know in advance that a certain tax is constitutionally valid; that another is not. Of course, from time to time a new type of tax may develop and its application to a particular state of facts must necessarily come before this court and its decision will have to be sought. In the *Puget Sound* case, however, the constitutionality of the tax as applied to transportation or communication in interstate or foreign commerce had been condemned for fifty years. There is no practical reason for its change and a long historically well-founded reason for its continuance. The principle of *stare decisis* is not only well settled, but extremely wise.

THE STATE OF WASHINGTON HAS BROAD POWERS OF TAXATION OVER THE OPERATIONS OF THE PUGET SOUND COMPANY

In its protection of interstate and foreign transportation and communication this Court has left the states broad powers of taxation. The personal and real property of Puget Sound is of course subject to an ad valorem property tax.

Old Dominion S.S. Co. v. Virginia, 198 U.S. 299 (1905);

Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292 (1944).

The Puget Sound Company could be taxed for the privilege of exercising its corporate franchise within the State by a non-discriminatory tax measured on the net income justly attributable to its business done within the State although part of its income so attributed is from interstate and foreign commerce.

Matson Navigation Co. v. State Board, 297 U.S. 441 (1936).

The Puget Sound Company, if a foreign corporation, might be taxed for the privilege of conducting whatever local business it might do by a non-discriminatory tax measured, in part at least, by gross receipts from interstate commerce.

Maine v. Grand Truck, 142 U.S. 217 (1891);

Ficklen v. Shelby County Taxing District, 145 U.S. 1 (1892);

Wis. & Mich. Ry. Co. v. Powers, 191 U.S. 379 (1903);

American Manufacturing Co. v. St. Louis, 250 U.S. 459 (1919).

See also

Ford v. Beauchamp, 308 U.S. 331 (1939).

The State of Washington may impose a gross receipts tax on Puget Sound based in part on receipts from interstate and foreign commerce if such a tax is in lieu of all other taxes.

U. S. Express Co. v. Minnesota, 223 U.S. 335 (1912);

Cudahy Packing Co. v. Minnesota, 246 U.S. 450 (1918);

Pullman Co. v. Richardson, 261 U.S. 330 (1923);

Great Northern Ry. Co. v. Minnesota, 278 U.S. 503 (1929);

Illinois Central R.R. v. Minnesota, 309 U.S. 157 (1940).

Professor Lockhart in his Article, at page 83, admits quite frankly that the same result sought to be achieved by a reversal of the *Puget Sound* case could now be attained by another form of tax. He says:

> "Taxes measured by gross receipts *can readily be drafted* which will void the practical difficulties considered above." (Emphasis ours)

His argument is that if gross receipts from interstate and foreign transportation and communication can be reached by another type of taxes it is purely "formal" for the court to forbid such receipts to be reached by a tax such as that now under consideration. To this court has been entrusted the duty of declaring the constitutional limits on taxes. As indicated, it has marked the boundaries between such taxes. If there are to be no boundaries or if the boundaries are

not to be enforced confusion will result to all concerned. Carrying Professor Lockhart's argument to a final conclusion would be like saying that while the legislature of a state did not happen to include certain property or activities within a tax, they could have done so, and therefore the tax should apply. Many other illustrations can be cited of valid state taxes imposed indirectly upon interstate and foreign transportation and communication.

CHANGE IN THE RULES SHOULD COME FROM CONGRESS

Where this Court has forbidden for many years as a burden on interstate and foreign transportation and communication a certain tax or form of tax, in the interests of certainty that rule should be continued. If in the light of changed conditions such a rule constitutes an undue prohibition upon the activities of the state, and if the imposition of such a tax, in the opinion of Congress, would not cause an undue burden upon interstate and foreign transportation and communication, Congress can undoubtedly change the rule made by this Court.

International Shoe Co. v. State of Washington, 66 Sup. Ct. 154, 158 (1945) ..... U.S. .....:

> "It is no longer debatable that Congress, in the exercise of the commerce power, may authorize the states, in specific ways, to regulate interstate commerce or impose burdens upon it."

Until Congress acts, however, the following language from the opinion of Mr. Chief Justice Stone in *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S.

434 (1939) is believed to be sound and peculiarly applicable:

> "For more than a century, since *Brown v. Maryland*, 12 Wheat. 419, 445, it has been recognized that under the commerce clause, Congress not acting, some protection is afforded to interstate commerce against state taxation of the privilege of engaging in it. * * * For *half a century*, following the decision in *Philadelphia & Southern S.S. Co. v. Pennsylvania*, 122 U.S. 326; *it has not been doubted that state taxation of local participation* in interstate commerce, measured *by the entire volume of the commerce, is likewise foreclosed.* During that period Congress has not seen fit to exercise its constitutional power to alter or abolish the rules thus judicially established. Instead, it has left them undisturbed, doubtless because it has appreciated the destructive consequences to the commerce of the nation if their protection were withdrawn. Meanwhile Congress has accommodated its legislation, as have the states, to these rules as an established feature of our constitutional system. There has been left to the states wide scope for taxation of those engaged in interstate commerce, extending to the instruments of that commerce, to net income derived from it, and to other forms of taxation not destructive of it. See *Western Live Stock v. Bureau of Revenue*, *supra*, 254, *et seq.*, and cases cited."

We cannot believe that the majority of the Court intended by any decision so far rendered to destroy or undermine the doctrine underlined in the foregoing quotation, either directly, or by erosion, as Professor Lockhart suggests on pages 76 and 77 of his Article.

CONCLUSION

Amicus curiae trusts that the ideas incorporated in this brief will be of some assistance to the court. These ideas may be summarized as follows:

1. The unanimous decision of this Court in *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U.S. 90 (1937), has never been modified or reversed. It has been distinguished but has never been disapproved or its holding questioned by a majority of the Court. It is supported by a "long" and "unbroken" line of decisions of this Court.

2. No decision of this Court since the *Puget Sound* case has ever held that gross receipts directly derived from interstate transportation and communication may be taxed by a state.

3. The case of *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938) merely represented the desire of this Court to avoid a constitutional ban on phases of commerce somewhat remotely connected with commerce itself.

4. The wide latitude granted to states by this Court to impose "use" taxes has been influenced by many factors such as the prejudice another rule might create between interstate and intra-state commerce. No such prejudice is here involved.

5. The danger of a cumulative tax is just as great whether such a tax be created in the same state or in another state. Such a cumulative tax in the same state exists in the State of Washington.

6. In the absence of Congressional action this Court must necessarily fix the rules as to what con-

stitutes an undue burden on interstate and foreign commerce. Unless such rules are fixed and rigid, state taxing bodies, the public, and lawyers have no rules by which to guide their actions.

7. If some rule of this Court in the protection of interstate and foreign commerce is believed to be too restrictive Congress may always be asked to modify the rule. Where the rule has been "long" and "unbroken" Congressional action is a better method of change than a sudden change by the Court itself.

Respectfully submitted,

GROSSCUP, AMBLER & STEPHAN,
JOHN AMBLER,
BEN C. GROSSCUP,
ALBERT E. STEPHAN,
Attorneys for Amicus Curiae.

Address:
807 Central Building,
Seattle 4, Washington.

APPENDIX I

State of Washington Business and Occupation Tax

Chapter 180, Laws of Washington, 1935, as amended by Chapter 156, Laws of Washington, 1943; Remington's Revised Statutes §8370-4.

"* * * From and after the first day of May, 1935, there is hereby levied and there shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be, as follows:

* * * * * * * * * * *

"(g) Upon every person engaging within this state in any business activity other than or in addition to those enumerated in subsections (a), (b), (c), (d), (e) and (f) above; as to such persons the amount of tax on account of such activities shall be equal to the gross income of the business multiplied by the rate of one-half of one per cent. This subsection includes, among others, and without limiting the scope hereof (whether or not title to materials used in the performance of such businesses passes to another by accession, confusion or other than by outright sale), persons engaged in the business of rendering any type of service which does not constitute a 'sale at retail' or a 'sale at wholesale' as defined herein."

Chapter 180, Laws of Washington, 1935, as amended by Chapter 249, Laws of Washington, 1945; Remington's Revised Statutes §8370-5:

"* * * For the purposes of this title, unless otherwise required by the context:

* * * * * * * * * * *

"(g) The term 'gross income of the business' means the value proceeding or accruing by reason of the transaction of the business engaged in and includes gross proceeds of sales, compensation for the rendition of services, gains realized from trading in stocks, bonds or other evidences of indebtedness, interest, discount, rents, royalties, fees, commissions, dividends, and other emoluments however designated all without any deduction on account of the cost of tangible property sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes or any other expense whatsoever paid or accrued and without any deduction on account of losses; * * *"

Chapter 180, Laws of Washington, 1935, as amended by Chapter 249, Laws of Washington, 1945; Remington's Revised Statutes §8370-12:

"* * * In computing tax there may be deducted from the measure of tax the following items:

* * * * * * * * * * *

"(f) Amounts derived from business which the State of Washington is prohibited from taxing under the constitution of this state or the constitution or laws of the United States;

* * * * * * * * * * *"

Chapter 180, Laws of Washington, 1935, as amended by Chapter 178, Laws of Washington, 1941; Remington's Revised Statutes §8370-187:

"* * * If any person shall engage in any business or perform any act for which a tax is imposed by this act, he shall, whether taxable or not, under such rules and regulations as the Commis-

sion shall prescribe, apply for and obtain from the Commission, upon payment of a fee of one dollar, a registration certificate. Said registration certificate shall be personal and not transferable and shall be valid as long as the taxpayer shall continue in business and pay the tax accrued to the state under the provisions of this act. In case business is transacted at two or more separate places by one taxpayer, a separate registration certificate for each place at which business is transacted with the public shall be required, but, for such additional certificates no fee shall be required. Each certificate shall be numbered and shall show the name, residence and place and character of business of the taxpayer and such other information as the Tax Commission shall deem necessary and shall be posted in a conspicuous place at the place of business for which it is issued. Where a place of business of the taxpayer is changed, the taxpayer must return to the Tax Commission the existing certificate, and a new certificate will be issued for the new place of business free of charge. No person shall engage in any business taxable hereunder without being registered in compliance with the provisions of this section: * * *."

APPENDIX II

Seattle Business Tax Ordinance

"Ordinance No. 72630

"An Ordinance relating to and providing for a license or occupation tax upon certain businesses, occupations, pursuits and privileges; defining offenses and prescribing penalties.

"BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

"Section 1: EXERCISE OF REVENUE LICENSE

POWER: The provisions of this ordinance shall be deemed an exercise of the power of The City of Seattle to license for revenue."

This Ordinance, approved June 4, 1943, was amended by Ordinance No. 73023, approved December 29, 1943, and by Ordinance No. 73335, approved June 8, 1944, and now provides in part as follows:

"Section 2. DEFINITIONS: In construing the provisions of this ordinance, save when otherwise declared or clearly apparent from the context, the following definitions shall be applied:

* * * * * * * * * *

"(e) The term 'gross income of the business' means the value proceeding or accruing by reason of the transaction of the business engaged in and includes gross proceeds of sales, compensation for the rendition of services, gains realized from trading in stocks, bonds or other evidences of indebtedness, interest, discount, rents, royalties, fees, commissions, dividends and other emoluments however designated, all without any deduction on account of the cost of tangible property sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes or any other expense whatsoever paid or accrued and without any deduction on account of losses.

* * * * * * * * * *

"Section 3. ENUMERATION OF PERSONS SUBJECT TO TAX—AMOUNT: On and after the first day of July, 1943, if this ordinance is then in effect, otherwise on and after the effective date of this ordinance, there is hereby levied upon and shall be collected from and paid as hereinafter provided by every person on account and for the

privilege of engaging in business activities, a license fee or occupation tax, sometimes herein referred to as the 'tax,' in amounts to be determined by application of rates given against value of products, gross proceeds of sale, or gross income of business, as the case may be, for the two calendar months next preceding the beginning of each bi-monthly period, as follows:

* * * * * * * * * *

"(f) Upon every person engaging within this City in any business activity other than or in addition to those enumerated in subsections (a), (b), (c), (d) and (e) above; as to such persons the amount of tax on account of such activities shall be equal to the gross income of the business multiplied by the rate of one-tenth of one per cent. This subsection includes, among others, and without limiting the scope hereof (whether or not title to material used in the performance of such business passes to another by accession, confusion or other than by outright sale), persons engaged in the business of rendering any type of service.

* * * * * * * * * *

"Section 10. DEDUCTIONS ALLOWED IN COMPUTING LICENSE FEES: In computing the license fee or tax there may be deducted from the measure of tax the following items

* * * * * * * * * *

"(e) Amounts derived from business which the City is prohibited from taxing under the constitution or laws of the State or the constitution or laws of the United States, and any amounts collected by the taxpayer as an excise tax .

* * * * * * * * * *

"Section 12. BUSINESS LICENSE REQUIRED: On

and after the first day of July, 1943, if this ordinance is then in effect, otherwise on and after the effective date of this ordinance, no person, whether subject to the payment of a tax or not, shall engage in any business or activity in The City of Seattle for which a license fee or tax is imposed by this ordinance without having first obtained and being the holder of a valid and subsisting license so to do, to be known as a 'Business License,' issued under the provisions of this ordinance, as hereinafter provided, and without paying the license fee or tax imposed by this ordinance. The fee or tax for the 'Business License' shall be the license fee or tax imposed by this ordinance in addition to the sum of One Dollar ($1.00), which shall accompany the application for the license. The license herein provided for shall expire at the end of the calendar year in which it is issued, and a new license shall be required for each calendar year. Applications for the license shall be made to and issued by the Comptroller on forms provided by him."